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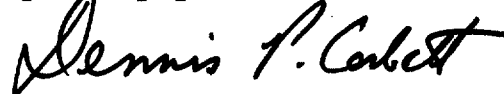
RECEIVED**JUL - 2 1991****BY HAND DELIVERY**Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYRe: File No. BPH-910213ME
Bethany Beach, Delaware

Dear Ms. Searcy:

On behalf of Jeffery Scott, applicant for a construction permit for a new FM station on Channel 278A at Bethany Beach, Delaware, I am transmitting herewith an original and four copies of his Opposition to Petition to Dismiss or Deny with respect to the above-referenced application.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,



Dennis P. Corbett

DPC:kb
Enclosures**RECEIVED**

JUL 3 1991

FM EXAMINERS

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

JUL - 2 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)

JEFFERY SCOTT)

For Construction Permit for)
New FM Station on Channel 278A)
at Bethany Beach, Delaware)

File No. BPH-910213ME

JUL 3 3 15 PM '91
AUDIO SERVICES
DIVISION

OPPOSITION TO PETITION TO DISMISS OR DENY

Jeffery Scott ("Scott"), by his attorneys and pursuant to Sections 73.3584 and 1.45 of the Commission's Rules, hereby opposes Eicher Communications, Inc.'s ("Eicher") Petition to Dismiss or Deny Scott's above-captioned application, filed with the Commission on June 17, 1991. In support whereof, the following is shown.^{1/}

Eicher claims that the Commission should dismiss or deny Scott's application on the following grounds. First,

^{1/} As a threshold matter, it should be noted that Eicher has failed to establish the requisite standing to support its Petition. Specifically, Eicher merely alleges that its President, Elaine C. Eicher, maintains a residence that falls within the service area of Scott's proposed facility. Petition at 2. However, Eicher has not supported its allegations with an appropriate affidavit, as required by the Communications Act of 1934, as amended. See, e.g., Applications of Certain Television Stations Serving Communities in the State of California, 6 FCC Rcd 2340 (1991) (citing 47 U.S.C. § 309(d)(1)). Accordingly, Eicher's Petition should be summarily denied for this reason.

Eicher claims that Scott submitted a defective amendment on May 16, 1991, proposing a new transmitter site, and that this allegedly defective amendment should be dismissed. Eicher then argues that Scott's application as originally filed should be dismissed, because it specifies a short-spaced transmitter site notwithstanding the availability of alternative sites.

Eicher's argument, however, mischaracterizes the substance of applicable Commission Rules. Contrary to Eicher's assertions, Scott's May 16, 1991 amendment was in full compliance with the Commission's Rules in effect at the time it was filed.^{2/}

Scott filed his Bethany Beach application on February 13, 1991 and sought certain necessary rule waivers for his originally proposed transmitter site. The application was accepted for tender by the Commission in its Public Notice, Rept. No. 14974, released April 16, 1991 at 11. In his May 16, 1991 amendment, which was filed as of right, Scott specified, inter alia, a new transmitter site for his proposed Bethany Beach facility. In doing so, Scott noted that his proposed new transmitter site was in full compliance with Section 73.213(c) of the Commission's Rules. That section currently provides that an application for authority to operate a Class A station

^{2/} This Opposition is fully supported by the Engineering Statement of Robert A. Bednarek, which is attached hereto.

with no more than 3 kW effective radiated power ("ERP") and 100 meters antenna height above average terrain ("HAAT"), where the channel allotment for the proposed station was made by order granting a petition to amend the Table of FM Allotments which was filed prior to October 2, 1989, must meet certain minimum distance separation requirements which are set out in a table contained in paragraph (c)(1) of the Section. 47 C.F.R. § 73.213(c).

With his amendment, Scott included an allocation study demonstrating that his new transmitter site would in fact comply with the distance separation requirements set forth in Section 73.213(c)(1). Because the Bethany Beach allotment was made by an order granting a petition to amend the Table of FM Allotments which was filed prior to October 2, 1989 (see RM-6916), and because Scott's application proposes no more than 3 kW ERP and 100 feet HAAT, Scott's amendment was entitled to be considered under Section 73.213(c)(1).

Since Scott submitted his May 16, 1991 amendment to the Commission, however, the Commission has announced that it is amending certain sections of Part 73 of its Rules -- including Section 73.213. See Memorandum Opinion and Order in MM Docket 88-375, FCC 91-128, released May 30, 1991. Specifically, effective July 15, 1991, the Commission will no longer generally allow applicants such as Scott to satisfy the

distance separation requirements set forth in Section 73.213(c)(1); rather, the Commission will allow applicants to rely upon the distance separation requirements of Section 73.213(c)(1) only with respect to facilities and allotments to which the allotment reference coordinates were short-spaced on the effective date of the allotment. In all other instances, the Commission will require such applications to satisfy the more stringent separation requirements set forth in Section 73.207 of the Commission's Rules.

For Scott, this change will mean that, as of July 15, 1991, his new transmitter site will be short-spaced to station WGMS-FM, which operates on Channel 278B at Washington, D.C. Scott's new transmitter site is 176 kilometers from WGMS, and although this distance exceeds the 163 kilometer separation currently required by Section 73.213(c)(1), it falls short of the 178 kilometer separation set forth under Section 73.207.^{3/}

Eicher asserts, however, that the Commission is not changing its Rules; rather, according to Eicher, the Commission's Memorandum Opinion and Order merely "restate[s]" and "reiterate[s]" the current state of Commission law. Petition at 4. That is, Eicher claims that it is now, and has been, the case that applications resulting from petitions to

^{3/} Scott is filing contemporaneously herewith a Petition for Leave to Amend and an Amendment to bring his application into compliance with the newly modified rule.

amend the Table of FM Allotments which were filed prior to October 2, 1989 must meet the Section 73.207 spacing requirements, except with respect to facilities and allotments to which the allotment reference coordinates were short-spaced on the effective date of the allotment. Id. According to Eicher, because Scott's May 16 amendment specified a transmitter site that did not meet Section 73.207 spacing requirements, Scott's amendment was defective and should have been dismissed.

A comparison of Section 73.213(c) as it is presently written and as it is written under the Commission's Memorandum Opinion and Order demonstrates the obvious error in Eicher's argument. Section 73.213(c) presently states:

Stations at locations authorized by grant of applications filed prior to October 2, 1989 that became short-spaced as a result of the revision of Section 73.207 in the Second Report and Order in MM Docket No. 88-375 may be modified or relocated in accordance with paragraph (c)(1) or (c)(2) of this section. New stations on channel allotments made by order granting petitions to amend the Table of FM Allotments which were filed prior to October 2, 1989, may be authorized in accordance with paragraph (c)(1) or (c)(2) of this section. No other stations will be authorized pursuant to these paragraphs.

The underscored language clearly authorizes Scott's May 16, 1991 amendment. In contrast, Section 73.213(c) as

written under the Commission's Memorandum Opinion and Order states:

Short spacings involving at least one Class A allotment or authorization. Stations that became short spaced on or after November 16, 1964 (including stations that do not meet the minimum distance separation requirements of paragraph (c)(1) of this Section and that propose to maintain or increase their existing distance separations) may be modified or relocated in accordance with paragraph (c)(1) or (c)(2) of this Section, except that this provision does not apply to stations that became short-spaced by grant of applications filed after October 1, 1989, or filed pursuant to § 73.215. If the reference coordinates of an allotment are short spaced to an authorized facility or another allotment (as a result of the revision of Section 73.207 in the Second Report and Order in MM Docket No. 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this Section only with respect to such short-spacing. No other stations will be authorized pursuant to these paragraphs.

(Final emphasis added).

As is evident, the language that authorized Scott's May 16, 1991 amendment has been entirely deleted. Moreover, the underscored language, which provides that an application must meet the spacing requirements of Section 73.207 unless the reference coordinates of an allotment are short-spaced to an authorized facility or allotment, is entirely new.

In addition, and as noted above, the Commission's changes to Section 73.213(c) are not even effective until July 15 -- nearly two weeks from now. Thus, not only is Eicher wrong in claiming that applications resulting from petitions to amend the Table of FM Allotments which were filed prior to October 2, 1989 generally had to meet Section 73.207 spacing requirements in the past; that requirement is not yet even presently in effect.^{4/}

Eicher's Petition should be summarily denied. While it alleges that Scott submitted a defective amendment on May 16, 1991 proposing a new transmitter site, Scott's amendment was, in fact, entirely authorized and appropriate. Eicher has claimed that Scott ignored and violated the requirements of Section 73.213(c) of the Commission's Rules; however, the requirements that Eicher cites were not only inoperative at the time that Scott submitted his amendment (and are not operative for another several weeks), they conflict with the provisions that were and still are in existence.^{5/}

^{4/} Although Eicher argues that the new language of Rule 73.213(c) merely "restates" the prior meaning of the rule, Eicher cites nothing in support of that bold claim. Rather, Eicher cites only to the Memorandum Opinion and Order which the Commission released on May 30, 1991, after Scott filed his amendment as of right.

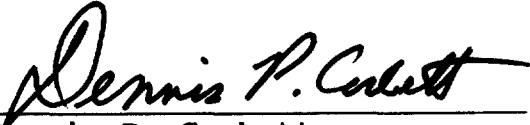
^{5/} Because Eicher's central argument about Rule 73.213(c) is so obviously flawed, Scott sees no need to address the

(Footnote continued on next page)

WHEREFORE, for the foregoing reasons, it is respectfully requested that Eicher's Petition to Dismiss or Deny Jeffery Scott's application be denied.

Respectfully submitted,

JEFFERY SCOTT

By 
Dennis P. Corbett
John B. Glicksman

Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809

July 2, 1991

His Attorneys

(Footnote continued from previous page)

- 5/ second half of Eicher's argument -- that Scott's application should be denied because his originally proposed transmitter site is defective. However, it should be noted that Scott's application as originally filed has already been accepted for tender and for filing (see Public Notice, Rept. NA-147, released May 13, 1991). Therefore, even if Scott had not taken the steps he did to amend his application on May 16, 1991, Eicher's arguments could be properly considered only in a motion to enlarge issues after hearing designation.

Attachment

RUBIN, BEDNAREK & ASSOCIATES, INC.

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ENGINEERING STATEMENT

I, Robert A. Bednarek hereby certify under penalty of perjury as follows: that I am a telecommunications consultant and a principal in the firm of Rubin, Bednarek & Associates, Inc. with offices at 1350 Connecticut Avenue, N.W., Washington, D.C. I hold a Bachelor of Science degree in Electrical Engineering from the University of Florida and am a certified Engineer-in-Training; my registration as a Professional Engineer is pending in the State of Florida. I have provided consulting services in the area of telecommunications since 1978. My qualifications in that regard area a matter of record with the Federal Communications Commission.

The firm of Rubin, Bednarek & Associates, Inc. has been retained by Jeffery Scott ("Scott"), an applicant for a new commercial FM broadcast facility in Bethany Beach, Delaware (File #BPH-910213ME) to prepare this Engineering Statement in support of an Opposition to a Petition to Dismiss or Deny filed by Eicher Communications, Inc. ("Eicher").

Background

Scott originally filed an application for use of Channel 278 in Bethany Beach, Delaware at a site located approximately 0.3 miles from Bethany Beach. On May 16, 1991, Scott filed an amendment to specify the present transmitter location which is approximately 2.3 miles from Bethany Beach. This transmitter site is the same as that specified in the pending Eicher application. As detailed in the Scott amendment, the coordinates of this site are:

38° 34' 21.0" N. Latitude

75° 06' 58.0" W. Longitude

The attached Table 1 is a reproduction of the frequency search which was provided in the May 16, 1991 amendment.

Required Separations

The Bethany Beach allotment was created as a result of a rulemaking petition which predated the adoption of the present mileage separations contained in Section 73.207 of the Rules and Regulations. As specified in the Scott application, Section 73.213(c) was used to evaluate the proposed site. Section 73.213(c) states:

New stations on channel allotments made by order granting petitions to amend the Table of FM Allotments which were filed prior to October 2, 1989, may be authorized in accordance with paragraph (c)(1) or (c)(2) of this section.

Section 73.213(c) clearly states that the mileage separations found in Section 73.213(c)(1) are to be used in the instant case. As demonstrated in Table 1, the proposed site meets all separation requirements.

Response to Petition

Eicher correctly points out that the proposed site is 176.5 kilometers from a co-channel station, WGMS-FM in Washington, DC. Section 73.213(c)(1) of the Rules requires that a proposed 3kW, 328' HAAT Class A facility maintain a minimum mileage separation of at least of 163 kilometers with respect to a co-channel Class B station like WGMS-FM. The existing 176.5 kilometer spacing is in excess of the 163 kilometer requirement. The mileage separation cited by Eicher and derived from those contained in Section 73.207 are not applicable to the Scott site under the present requirements of Section 73.213(c).

It is noted that the Commission has recently modified Section 73.213(c). This modification was released by the Commission on May 30, 1991 and does not take effect until July 15, 1991. Under the modified provisions of Section 73.213(c), applicants must demonstrate that the reference point of the Class A allotment is short-spaced under the separation criteria contained in Section 73.207 in order to avail themselves of the reduced separation requirements of Section 73.213(c)(1).

Conclusions

Section 73.213(c) presently instructs applicants for Class A allotments, created as a result of rulemakings initiated prior to the adoption of the increased mileage separation criteria, to use the "old" criteria now found in Section 73.213(c)(1). There is no further qualification or criteria which must be met in order to use these mileage separations. Accordingly, Scott properly applied the mileage separations in the evaluation of the site proposed in the May 16, 1991 amendment.

This Engineering Statement was prepared by me personally or under my direction. All of the facts contained herein are true except where stated to be on information or belief and to those facts I believe them to be true.


A handwritten signature in dark ink, appearing to read "Robert A. Bednarek", written over a horizontal line.

Robert A. Bednarek
July 1, 1991

CERTIFICATE OF SERVICE

I, Kaigh K. Johnson, do hereby certify that a copy of the foregoing "Opposition to Petition to Dismiss or Deny" was mailed, United States first-class postage prepaid, this 2nd day of July, 1991 to the following:

Stephen Diaz Gavin, Esq.
Besozzi & Gavin
1901 L Street, N.W.
Suite 200
Washington, D.C. 20036
Counsel for Eicher Communications, Inc.


Kaigh K. Johnson